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In The

Supreme Court of the United States

October Term, 1996

ROCKY MOUNTAIN CONFERENCE OF THE UNITED METHODIST CHURCH, a Colorado non-profit corporation,

Petitioners,

vs.

DIANE WINKLER,

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of the State of Colorado
Case Nos. 94CA652 and 94CA661

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Holland, Seelen & Pagliuca
Joyce A. Seelen*
1700 Lincoln St., Suite 2350
Denver, Colorado 80203
(303) 832-7700

*Counsel of Record *Attorneys for Respondent*

24pp

QUESTION PRESENTED

Whether a church organization is exempt from tort liability for secular conduct that does not burden the free exercise of religion, and no record evidence indicates that the petitioner's tortious conduct was rooted in any religious belief.

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OPINION BELOW

The opinion of the Colorado Court of Appeals (pet. app. A) affirming a jury verdict in favor of respondent is reported at *Winkler v. Chambers*, ___P.2d ___ (Colo. App. 1995). The Colorado Supreme Court denied Petitions for Certiorari on September 3, 1996. Pet. app. B.

JURISDICTION

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sec. 125(3)

STATEMENT OFF THE CASE

Respondent, Dianne Winkler, filed suit against the Rocky Mountain Conference of the United Methodist Church ("Conference"), and Rev. Glenn Chambers, a Methodist Minister. Her claims against Chambers included breach of fiduciary duty, and outrageous conduct based on the minister's sexual touching of Winkler that grew out of his counseling of her. Her claims against the Methodist Conference included breach of fiduciary duty, outrageous conduct, and negligent hiring and supervision based on the antecedent knowledge of the Conference that Chambers had sexually approached other vulnerable people and had a longstanding and untreated alcohol problem and on the actions of the Conference subsequent to Winkler's report.

The tortious conduct aggravated a preexisting physical and emotional condition causing Winkler to become ill.

The jury returned verdicts for Winkler of $57,350 against Chambers on the breach of fiduciary duty claim, of $95,853 against the Conference on her negligent hiring and supervision claim and of $10,651 against the Conference on her breach of fiduciary duty claim.

The facts underlying Winkler's claims are recounted in the opinion of the Colorado Court of Appeals, pet. app. A at 2a-4a. Winkler incorporates those facts by reference.

Several sets of facts alleged by the Methodist Conference in its Petition are incorrect: First, the Conference claims at page 16 that the Conference had no prior knowledge of Rev. Chambers' propensity to abuse women before 1992. The Conference ignores the 1972 complaint which involved "another woman", and the 1986 complaint of Rev. Munsey-Nielson, a female associate pastor of Grace Church that Chambers, on occasion, came into her office, touched her inappropriately, and told her to "pucker up." Tr. X: 151. In 1986, Rev. Munsey-Nielson told a District Superintendent for the Conference about concerns expressed to her by other women regarding Chambers' actions toward them. Tr. X: 148-164. In 1990, Chambers approached the wife of junior minister Harold Anderson, who reported it to the local church. Tr. XI: 125, 133. When Conference officials were told directly of Pam Anderson's complaint in 1992, they suggested to Pam Anderson that she withdraw her Complaint against Chambers (Tr. XI: 125) and actively opposed Harold Anderson's support for the women harmed by Chambers. Tr.

XI: 138. At page 5 of its Petition, the Conference acknowledges a 1991 complaint by parishioner Jan Place, but discounts its value because it was not in writing. Place testified that, when she called District Superintendent Margaret Rush Hankins in 1991 to report the abuse by an unnamed clergyman, Rush Hankins guessed, "Are we talking about Glenn Chambers.", to which Place replied, "Yes." Tr. X: 180-181. Carol Klein filed her complaint of abuse in 1992.

Second, the Conference claims at page 7 that the "supervision" by the District Superintendents of ministers is limited to formulating statements of purposes. The evidence at trial showed that the Conference exercised virtually complete control over the annual hiring and supervision of pastors. The Conference, not the individual churches, controlled the 1972, 1980, 1986, 1991 and 1992 complaints about Rev. Chambers. Tr. IX: 46; Tr. X: 86-98, 168; Tr. XI: 77; Tr. XII: 83-89; Tr. XIII: 28. The Conference kept the individual churches uninformed of Chambers' history. The Conference, through District Superintendent Rush Hankins, took control of the 1992 complaints, called the women together in 1992, ostensibly to help the women, and then distorted what the women had told her. Tr. IX: 46; Tr. XII: 231; Tr. XIV: 194-195.

Third, the assertion at page 5 of the Petition that Chambers has, through the present, denied his sexual conduct with any of the women, is inaccurate. Chambers admitted his problem with alcohol and stated that, as a result, he did not remember most of the incidents described by the women who accused him. Pet. app. A, 4a. "As to the incidents he did remember, he stated that any verbal

comments were misunderstood and that the physical contact was incidental." *Id.* Regarding one of the incidental contacts during which Chambers testified he had been drinking, he said, "Ms. Klein wears most often very interesting clothing...She often times wore a T-shirt of some kind that had something written on it...On the particular occasion we're talking about...I couldn't quite read it, and I put my hand forward and smoothed it out to see what was there, and I touched her breast." Tr. XII: 124.[1]

The Colorado Court of Appeals determined that the evidence at trial was sufficient to support Winkler's claims for breach of fiduciary duty and negligence in hiring and supervision. As the Court of Appeals notes at pages 5a and 7a of pet. app. A, neither Chambers nor the Methodist Church asserted at trial that the tortious conduct complained of -- i.e. Chambers' sexual touching of Winkler; the Church's failure to investigate the growing complaints against Chambers subsequent to 1972; the Church's undermining the credibility of the women by telling the congregation that there was nothing in Chambers' history that indicated he had problems; telling the congregation that the women hurt by Chambers were being given counseling, when they were not --was mandated by any religious tenet or belief. Rather, the Methodist Church argued that the First Amendment to the U.S. Constitution prohibits subject matter jurisdiction where clergy hiring and supervision are

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[1]At page 6, the Conference inappropriately injects significant private information about Winkler, including a diagnosis of herpes that was not caused by Chambers and that is totally irrelevant to the questions addressed to this court.

involved, which argument was rejected by the Court of Appeals.

REASONS FOR DENYING THE PETITION

I. This case is not worthy of certiorari review because the Colorado Court of Appeals' holding is consistent with this Court's well-established precedents.

The decision of the Colorado Court of Appeals in this case raises no unsettled issue of federal law. The Colorado court followed well-settled decisions of this Court in holding that laws burdening conduct not proven to be rooted in religious belief do not violate the First Amendment's free exercise clause.

The Methodist Conference cannot argue that the Colorado Court of Appeals ought to have examined evidence concerning the actual impact of tort liability on the Conference's religious belief. Such weighing of evidence in this case is impossible because the Methodist Conference did not present evidence showing whether and how their tortious conduct was required by their specific religious belief. The argument at trial, rather, was much as it is to this Court: Religious organizations should be exempt from tort liability.

A. The Colorado Court of Appeals followed well-settled decisions of this Court in holding that legal restriction of "secular conduct" not proven to be rooted in religious belief does not burden the free exercise of religion.

The Conference has never provided record evidence or even specific allegations showing that its tortious conduct was rooted in any religious belief. Based on this record, the Colorado Court of Appeals applied well-settled law to hold that the judgment in this case did not burden the free exercise of religion. This holding is consistent with every decision by this Court. It also raises no important or unsettled principle of constitutional law. Therefore, this Court should deny the Conference's petition.

This Court has long held that conduct is not "exercise of religion" unless the conduct is mandated by sincerely held religious belief. *See*, e.g. *Frazee v. Employment Security Dep't*, 489 U.S. 829, 834 (1989)(to prove violation of free exercise clause, litigant must show that burdened conduct "was based on a sincerely held religious belief"); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)(law does not burden free exercise rights unless it has a "tendency to coerce (Rev. Chambers and the Methodist Church) into acting contrary to their religious beliefs"); *Hobbie v. Unemployment Appeals Com'n*, 480 U.S. 136, 141 (1987)(burdened conduct must be "mandated by religious belief" to be protected by free exercise clause)(quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)("to have

protection of the Religion Clauses, claims must be rooted in religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Under all of this Court's well-established free exercise precedents, the Conference has no defense to tort liability unless the specific tortious acts were actually "mandated by religious belief." *Hobbie*, 480 U.S. at 141. The Methodist Conference has the burden of proving with record evidence that its tortious conduct and religious belief are "inseparable and interdependent." *Yoder*, 406 U.S. at 215.

Moreover, mere assertion that a law burdens some practices that might conceivably be religious has never sufficed to show a violation of the free exercise clause. The party asserting a defense based on the free exercise clause has the burden to show with record evidence that his or her conduct is mandated by a sincere religious belief. *Yoder*, 406 U.S. at 215. *See* also *Messiah Baptist Church v. County of Jefferson, Colorado*, 859 F.2d 820 (10th Cir. 1988)(free exercise clause challenge to zoning ordinance requires "evidence in the record" that location of church "is integrally related to underlying religious beliefs.") The Free Exercise Clause of the First Amendment does not grant churches the immunity from being sued in civil courts. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U. S. 619 (1986).

Assuming the Conference had established religious motivation, the free exercise clause would not bar Colorado from enforcing generally applicable religiously neutral rules that prohibit or burden even religiously motivated conduct.

Employment Division Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

The Conference reliance on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993), at pages 17 through 24 of its Petition is misplaced. Equating a municipal ordinance specifically designed to prevent a religious practice with the neutral application of common law is nonsensical. In *Church of Lukumi*, this Court noted that the inquiry to determine whether a law was neutral is whether the "object of the law is to infringe upon or restrict practices because of their religious motivation." *Id.* at 2227. If the answer is "yes", the law is not neutral and requires a compelling state interest test. The object of the tort of negligence and breach of fiduciary duty is to provide compensation to plaintiffs injured by the tortious conduct of another. The torts are religion neutral and, even assuming the conduct at issue was tied to religious belief, the First Amendment is no defense pursuant to *Smith*.

The Conference contends at pages 22 through 28 that state courts are inconsistent in their approaches to allowing negligence claims against religious organizations and that Colorado itself is internally inconsistent. This claim is based on a misunderstanding of Colorado law and on a misrepresentation of the record supporting the facts in this case. For example, *Roman Catholic Bishop v. Superior Ct.*, 50 Cal. Rptr. 2d 399 (Cal App. 4 Dist. 1996); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991), *Jones by Jones v. Trane*, 591 N.Y.S.2d 927 (N.Y. Sup. 1992), were each cited by the Conference as requiring some notice to the religious entity before liability for negligence in hiring or

supervision could be imposed on it. Colorado, however, has the same requirement. Antecedent knowledge, not any religious belief, provides the basis of liability for an employer negligence claim in Colorado whether the employer is a religious entity or not. *See, Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), cert. denied, ____ U.S. ___, 114 S.Ct. 2153 (1994) (case involving negligent hiring by religious employer) and *Connes v. Molalla Transp. System, Inc.*, 831 P.2d 1316 (Colo. 1992) (case involving negligent hiring by secular employer.)

At pages 10 and 11, the Conference recasts Winkler's claims into claims in which a civil court decided selection of clergy. The recasting is inaccurate. Consistent with federal and Colorado law, Winkler's verdict did not intrude into the clergy selection process. It addressed only the decision by the Methodist Conference to hire Chambers into a position where he was given intimate access to vulnerable women in a counseling setting, when the Conference knew that his history placed those women at risk. By way of analogy, the same analysis would have applied if the Conference had allowed Chambers to drive buses filled with parishioners in situations where the Conference knew that Chambers had a history of driving carelessly. Freedom to select clergy is protected. Decisions by a religious employer to allow clergy involved in secular conduct to harm unsuspecting third parties, is not protected.

At pages 11 through 14, the Conference criticizes the Colorado Supreme Court generally for perceived internal inconsistencies. A review of the cases cited shows that Colorado carefully and appropriately decided the cases cited by the Methodist Conference. *Van Osdol v. Vogt*, 908 P.2d

1122 (Colo. 1996), involved a minister who sued her church concerning her ministry. The Colorado Supreme Court held that the choice of minister is protected. Nothing in that decision runs contrary to this Court's jurisprudence, or to the Colorado Supreme Court rulings in *Moses* or *DeStefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) or *Bohrer v. DeHart*, ___ P.2d ___ (Colo. App 1996), pet. app. C. In distinguishing the negligence claims from internal church conflicts, the *Van Osdol* court stated in footnote 17:

> "...the court...looks to whether the specific danger which ultimately manifested itself could have reasonably been foreseen at the time of hiring. This inquiry , even when applied to a minister employee, is so limited and factually based that it can be accomplished with no inquiry into religious beliefs."

Indeed, in *Winkler*, there was no inquiry into religious beliefs at either the trial or appellate stage of the action.

The Conference also misrepresents the record. The Conference contention in its Petition that Winkler's negligence evidence was limited to "second guessing" (page 2) a Conference which had no knowledge of Chambers' abuse of women before 1992 (page 16) is inaccurate. By its procedures, the Conference rehired Chambers into a specific church each year. Each year the Conference gained increasing knowledge of Chambers' sexually abusive behavior toward women and of the conduct problems related to his alcoholism, as set out on pages 2 through 4, herein, and pages 2a and 3a of pet. app. A. That antecedent knowledge, not any religious belief, provided the basis of

liability for the negligence claim, consistent with Colorado cases as well as cases of other jurisdictions.

By virtue of the Conference changing the pastoral assignments of ministers, it was the only entity that had a complete picture of Chambers' abusive history and his alcohol problem.

At page 19, the Conference contends that the State of Colorado is required to restrict its breach of fiduciary duty claim to claims involving financial affairs. The essential premise of the Conference argument is that when a clergyman is sued for breach of fiduciary duty other than conduct involving taking money, it is his status as a clergyman which gives rise to the fiduciary duty. This premise was directly addressed in *DeStefano* and in *Moses*. When applying the neutral common law tort of breach of fiduciary duty, the relevant inquiry is "not the profession of the defendants. The relevant facts are that the defendants...occupied a position of superiority, assumed a duty to act in good faith, and then breached their duty." *Moses, supra*, footnote 13.[2]

The Colorado Supreme Court has recognized that, under appropriate circumstances, a clergyman, may, but need not be, in a position of trust, just as, depending upon the circumstances, a wide range of persons may seek positions of trust. *See, Moses, supra*, and *DeStefano,*

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[2]Much of the Conference brief alleges that the Colorado Supreme Court erred when it decided the Moses case. This Court declined to review the decision of the Colorado Supreme Court in that case in 1994 at 114 S.Ct. 2153.

supra. The "status" involved, is not clergy or non clergy, it is a person in authority who seeks a special trust such that another has the right to rely on the fiduciary.

A fiduciary duty, under Colorado law, must be undertaken by the fiduciary. *Moses, supra.* In this case, a Conference District Superintendent called a meeting of six of the women who had been abused by Chambers, and told them that the Conference would care for them. The Plaintiff alleged, and the jury found, that the Conference had used the trust it sought in order to manipulate Winkler. The *Winkler* court properly concluded that "(f)iduciary liability requires not only a repose of trust, but an assumption of a duty and a breach of that duty" (pet. app. A, 6a.) and that the Conference had "assumed a duty to act in Winkler's best interests." Pet. app. A, 7a.

Neither the negligence claim nor the breach of fiduciary duty claim was predicated on how Chambers was disciplined in the church grievance procedure: The negligence claim was based on prior notice to the Conference of the danger Chambers posed; the breach of fiduciary duty claim was based, not on how Chambers was treated, but on how Winkler was treated by an entity that sought and then betrayed her trust.

The torts at issue are neutral laws of general applicability, both on their face and in their application. There is no targeting of religious activity. An identical result would have been reached in this case if the Conference had been a non-religious employer whose dangerous employee provided damaging care or counseling to a vulnerable person, and the employer, under pretext of

assisting the person harmed, gained trust and then misused that trust in order to protect itself.

The holding by the Colorado Court of Appeals in *Winkler* is consistent with every decision of this Court. It presents no unsettled or important questions of federal law. Therefore, the petition of the Rocky Mountain Conference of the United Methodist Church should be denied.

B. Because the Methodist Church never presented record evidence concerning how its tortious conduct was required by any sincerely held religious belief, this case presents no important or unsettled federal question concerning the actual impact of tort liability.

Neither the Conference nor Chambers has ever articulated how specific tortious actions were allegedly motivated by a deeply held religious belief. The Conference raises the Book of Discipline, a document which the Conference revises every four years and which contains, among other things, an outline of current procedures used in the Methodist Church. The fact that procedures are written down and set forth in a document does not create a presumption that the procedures are motivated by a deeply held religious belief.

Moreover, none of the specific tortious actions complained of against Chambers or the Conference were either mandated by or prohibited by the Book of Discipline. There is no mandate or prohibition about keeping secret the sexual abuse of its ministers. There is no mandate or

prohibition about deceiving and manipulating vulnerable parishioners. The Conference argues that, since it did not violate its own procedures, the First Amendment prohibits inquiry into its actions. In place of a specific articulation of how the acts complained of were mandated by a religious belief, there is a presumption that, because Chambers is a minister and the Conference a religious organization, all actions are religious. Because of lack of proof that the tortious actions were motivated by religious belief, the Court of Appeals properly found that Chambers' and the Conference's First Amendment defense was meritless.

Because the Methodist Conference has not alleged -- let alone proven-- that its specific tortious acts were "mandated" by its Methodist religious faith, it has not properly alleged any defense to tort liability under the First Amendment. Specifically, the Methodist Church has never argued at trial or in any of the briefs that its Methodist religious faith requires it to (1) hire ministers suffering from active alcoholism and a known history of sexually abusive behavior with women and authorize such ministers to provide counseling to psychologically vulnerable parishioners; (2) allow such ministers to engage in touching the breasts of parishioners; (3) tell the congregation that women abused by Chambers were receiving adequate counseling, when they were not; (4) undermine the credibility of the women abused by Chambers by telling the congregation that there was nothing in his personnel file that indicated he had problems; (5) deceive the women by telling them that it would send a letter to the congregation stating that it found the women's complaints credible, and then failing to send the letter; or (6) assume a duty to act in the best interests of the parishioner and later breach this

duty to protect the Methodist Church or the career of the minister.

The Conference has never articulated a religious motivation or substantial burden to exercise of religion that could provide the basis of the compelling state interest analysis it requests.

The Colorado Court of Appeals properly found that resolution of this case did not require interpreting and weighing of church doctrine, but rather allowed application of neutral principles of law to determine the liability of the Conference. In other words, the Colorado Court of Appeals determined that the burdens imposed by tort liability in this case had not been shown to be burdens on anything but secular conduct.[3]

II. The Religious Freedom Restoration Act, U.S.C., Sec. 2000bb ("RFRA") does not grant immunity to the Conference.

Congress enacted RFRA in response to this Court's decision in *Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that the free exercise clause does not bar states from enforcing generally applicable religiously neutral rules

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[3] The Colorado Court of Appeals' holding is consistent with this Court's jurisprudence in *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Employment Division Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

to prohibit or burden even religiously motivated conduct, such as the use of peyote in religious ceremonies. Believing that laws might burden important religious liberties even if the laws were general and religiously neutral, Congress enacted RFRA to codify the free exercise jurisprudence in cases decided prior to *Smith*. *See* S. Rep. No. 103-111, 103rd Cong. 1st Sess. at 8-9, reprinted in 1994 U.S.C.C.A.N. 1892, 1904.

RFRA requires a compelling interest test that involves a three-stage analysis: (1) Whether the conduct in question is motivated by a religious belief; (2) Whether the state action infringes on the free exercise of religion; and (3) Whether there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Since the Conference has failed to identify conduct protected under either of the first two prongs, there is no basis upon which to apply the third prong.

At pages 14 and 17 of its Petition, the Conference contends, in essence, that RFRA grants it immunity in this case, even if the First Amendment does not. That argument fails for several reasons. Fundamentally,as discussed above, mere assertion that a law burdens some practices that might have a religious tie, has never sufficed to show a substantial burden to the exercise of religion. In addition, under RFRA, there is no defense to tort liability unless the specific tortious acts were actually mandated by religious belief. The Conference has never presented record evidence concerning how its tortious conduct was required by any sincerely held belief, and there is no predicate upon which a RFRA compelling state interest analysis could be predicated.

CONCLUSION

The Colorado Court of Appeals' decision correctly applied the legal standards as set forth in decisions by this Court by applying uncontroversial, universally accepted principles of constitutional law. Therefore, this Court should deny the petition of the Rocky Mountain Conference of the United Methodist Church.

Respectfully submitted,

HOLLAND, SEELEN & PAGLIUCA
JOYCE SEELEN*
1700 Lincoln, Suite 2530
Denver, Co. 80203
(303)832-7700

Attorneys for Respondent

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